NO. 82-6115

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FLOYD ERNEST HILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER OR NOT THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT PETITIONER WAS NOT HARMED, UNDER THE FACTS OF THIS CASE, AS A RESULT OF ANY REFERENCES TO PETITIONER'S PRETRIAL, POST-ARREST SILENCE?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Floyd Ernest Hill, was indicted by the March Term, 1981, Cobb County Grand Jury for the malice murder of Austell, Georgia police officer Gregg Mullinax and the felony-murder of Mr. Darryl Toles. (R. 3-4). Petitioner was tried on July 13-22, 1981, and was found guilty on both counts. He received the death penalty for the murder of officer Mullinax and received a life sentence for the felony-murder of Darryl Toles. (R. 33-38). The death penalty on the malice murder count was supported by the jury's finding that said murder was committed against a peace officer while he was engaged in the performance of his official duties. (R. 37-38, T. 310, 312-315). See, O.C.G.A. § 17-10-30(b)(8); Ga. Code Ann. § 27-2534.1(b)(8).

On direct appeal to the Georgia Supreme Court, Petitioner's conviction and sentence for malice murder were affirmed; however, his coviction for the felony-murder of Darryl Toles was reversed, because it was clear that Petitioner did not actually shoot Toles, and under the Georgia felony-murder statute as interpreted by the Georgia Supreme Court, in order to be convicted of felony-murder a defendant must directly cause the death of the victim. Here, Toles was killed by a police officer who was returning fire at the Petitioner. Hill v. State, 250 Ga. 277, 295 S.E.2d 518 (1982). Petitioner's motion for a rehearing in the Georgia Supreme Court was denied on November 29, 1982. Thereafter he filed the instant petition for a writ of certiorari in this Court.

PART TWO

STATEMENT OF THE FACTS

A summary of the facts which the jury was authorized to find is set out in the opinion of the Georgia Supreme Court. Hill v. State, supra at 277-279.

The evidence showed that on the night of February 8, 1981, Austell, Georgia police officer Gregg Mullinax was shot to death while answering a call for assistance. A bystander at the scene, Darryl Toles, was also shot and killed during the shooting incident.

The shooting arose as a collateral consequence of a domestic argument between Virginia Barber and her common-law husband, Edward Saffo, both of whom had been drinking. (T. 601, 666, 682, 711). During the quarrel, Saffo had fired his .32 caliber pistol at least twice. (T. 751-752, 662-663, 672, 711-713). When Saffo physically struck Virginia Barber with his hand, a relative of Barber, who was at the scene, approached Petitioner Hill who was in a nearby parked vehicle, and asked for assistance. Petitioner initially indicated that he would not help, stating, "He was too drunk." (T. 752, 761-762). Ultimately, the police were called and notified of the volatile situation. (T. 545-546, 753). Meanwhile, Petitioner had asked his daughter to retrieve his gun from his nearby residence. (T. 701-702).

During the argument between Barber and Saffo, Barber grabbed a pair of scissors, and pursued Saffo into the street. (T. 639-640, 664, 753). Virginia Barber's fifteen year old son, Stanley, also took a butcher knife from the trailer and followed after Barber and Saffo. (T. 641, 753).

Austell police officer Gregg Thames, testified that he was riding in a patrol unit with officer Mullinax when they received a call pertaining to the aforesaid incident between Barber and Saffo. The radio call indicated that there was a domestic argument, one of the participants was armed, and that

a man was beating a woman. (T. 545). Thames testified that when he and Mullinax arrived, he observed a group of people in the street watching the confrontation. (T. 545-546). Thames testified that Mullinax stepped out of the police vehicle and went directly towards Saffo who stated, "Everything is okay. It's cool. Let's go home." (T. 546). Thames did not see Saffo in possession of a pistol. (T. 560). While Mullinax went towards Saffo, officer Thames directed his attention towards Virginia Barber, who continued to argue and fight. (T. 546). Thames testified that he arrested Barber and attempted to place her in the rear of the patrol car but had difficulty getting the door closed. (T. 546-547). Thames testified that as he tried to force the door closed in the patrol car, Barber's son, Stanley, became involved in the fight. He was ultimately subdued and placed inside the vehicle; however, by this time, Virginia had escaped. (T. 547, 570-572).

While officer Thames was scuffling with Virginia Barber, he noticed a vehicle drive up. Testimony from other witnesses showed that the Petitioner had driven his green Torino down the road and had parked directly behind the police car. (T. 548, 607, 665, 756). Officer Thames requested help from the Petitioner, asking that he clear nearby children away from the area, but Petitioner refused to help. (T. 549, 562, 576). As officer Thames was attempting to close the door on Stanley Barber, another female bystander, apparently Janice Miller, started to scuffle with him. (T. 549, 571). During this time Darryl Toles arrived at the scene, and stood by the Petitioner's car watching the confrontation. (T. 610-611, 688-689, 693-695). Darryl Toles did not involve himself in the argument, but remained merely a bystander. (T. 719).

While officer Thames was struggling with Janice Miller, Petitioner was seen pulling a pistol, and the first shots were fired by him. (T. 549-550, 666, 677, 757-758, 760). Several eyewitnesses testified that they observed Petitioner firing his .38 caliber pistol. (T. 645-647, 651-654, 668-669, 717, 764).

Rapid shots were thereafter exchanged between the Petitioner and officer Mullinax. (T. 720, 758). During the exchange of fire, Darryl Toles was shot as he stood nearby. (T. 552, 758-759). Officer Mullinax was also struck by the gunfire. (T. 550, 558-559).

Petitioner was wounded during the shooting, left the scene and retured to his house after asking a friend to retrieve his automobile. (T. 671, 703, 1067, 1078). Edward Saffo also left the scene, and proceeded to the Petitioner's house to see about his niece. Upon arriving, he observed the Petitioner sitting in the bedroom of his house, bleeding and holding a gun which he promptly pointed at Saffo. (T. 721, 1067, 1081). According to the Petitioner he then left the residence and collapsed in the nearby woods. (T. 1067-1068).

Police officers followed a trail of blood from the scene of the shooting to the Petitioner's residence and eventually to a wooded area where he was found lying on the ground. (T. 582-584, 593, 824-825, 827-828). He was taken to the Cobb General Hospital where his wounds were treated. (T. 882, 833). He had wounds in his right lower arm, his upper arm, and on the right side of his chest. (T. 793-794, 797-798). A .32 caliber revolver containing five live rounds were in Petitioner's possession at the time he was found by police. (T. 825-826, 977).

Although tests run from the swabbing of Petitioner's hands were negative for metal residue which may have resulted from his firing a pistol (T. 1048), Cobb County police officer Robert Tressel testified that he had observed gunpowder stippling on the Petitioner's right hand as he was performing a neutron activation analysis test on the Petitioner. (T. 1089-1090).

The Chief Medical Examiner for Cobb and DeKalb Counties, Dr. Joseph Burton, performed an autopsy on police officer Mullinax. (T. 987-990). The cause of death to officer Mullinax was a gunshot wound to his chest caused by a .38 caliber bullet. (T. 1000). Officer Mullinax was also wounded in the left thigh and left forearm. (T. 993, 997).

Dr. Burton also performed the autopsy on victim Darryl Toles. (T. 1002). Victim Toles sustained bullet wounds to the chest, arm and thigh areas. (T. 860-861, 1002-1004). The cause of death to Mr. Toles was the gunshot wound which entered his chest. (T. 1004).

Several days after the shooting incident, fifteen year old Kevin Tucker discovered a .38 caliber pistol in the wooded area between the Petitioner's residence and the Barber trailer. (T. 775-776, 868). The gun contained three empty .38 caliber cartridge casings and one .38 caliber Peters bullet which had been struck by the firing pin but which had misfired. One of the cylinders was also empty. (T. 869-870).

Ballistics tests were run on Officer Mullinax's .357 Magnum revolver and on the .38 caliber pistol which was found in the wooded area approximately twenty feet from where the Petitioner was discovered. All six bullet cartridges from officer Mullinax's weapon had been fired. (T. 840, 972). No tests were conducted on the .32 caliber pistol which was found in the Petitioner's possession at the time he was discovered by police, because it was determined that none of the victims had been shot with that caliber weapon. (T. 825-826, 978, 983-984). Ballistics tests determined that the bullets recovered from the body of officer Mullinax, had been fired from the .38 caliber pistol which had been found by Kevin Tucker, near where the Petitioner was discovered. (T. 980, 995). Tests also revealed that the two. 357 Magnum bullets removed from Darryl Toles and from under his stretcher had both been fired from officer Mullinax's revolver. (T. 975-976, 1001, 1009).

Petitioner testified at trial and admitted driving to the murder scene. He stated he had attempted to assist the police officers until he heard gunfire. (T. 1066-1067, 1070, 1072-1073). He alleged that officer Mullinax fired first, and that he did not know where the other shots had come from. (T. 1075). Petitioner also testified that he was shot from

behind (T. 1085), and he denied that he had fired a weapon at the scene. He admitted returning home after being wounded. (T. 1066-1068, 1078-1079, 1086). Petitioner testified that after he returned home, he retrieved his wife's pistol from under a mattress, and when Saffo arrived, he pointed the pistol at Saffo and told him to leave. According to the Petitioner, at that point he became scared, ran outside, and passed out in the woods. (T. 1067-1068, 1080-1081).

The testimony of Dr. Burton refuted Petitioner's statement that he had been shot from behind. (T. 1095-1105). Burton examined Petitioner's T-shirt and determined that the shirt fibers indicated the bullet passed into the front of the shirt and exited at the back. (T. 1098-1099). Furthermore, Petitioner's chest wound exhibited characteristics of a gunshot entry wound, and not an exit wound. Petitioner exhibited no wounds which demonstrated that he had been shot from back to front. (T. 1100, 1102-1103).

Additional facts may be referred to in the following portion of this Brief when necessary to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

THE GEORGIA SUPREME COURT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A MISTRIAL, FINDING THAT ANY REFERENCES TO THE PETITIONER'S PRETRIAL, POST-ARREST SILENCE CONSTITUTED HARMLESS ERROR UNDER THE FACTS OF THIS CASE.

Petitioner urges this Court to grant the writ of certiorari in order to resolve the question of whether or not the prosecution's references to a defendant's pretrial, post-arrest silence may be found to be harmless error in any case. Alternatively, Petitioner urges this Court to grant the writ to determine whether or not, under the specific facts of this case, the Georgia Supreme Court properly found said references to be harmless error beyond a reasonable doubt.

It is now well-settled that prosecutorial comment upon a defendant's silence following his arrest and advisement of the Miranda warnings, is constitutionally prohibited whether the comment is for substantive or impeachment purposes. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975); Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966). Notwithstanding the constitutional prohibition against a prosecutor's use of a defendant's post-arrest silence, this Court has suggested that any such error might be rendered harmless under the standard of Chapman v. California, 386 U.S. 18 (1967). United States v. Hale, supra; Doyle v. Ohio, supra. Every Federal Circuit Court of Appeals has recognized and applied the harmless error standard in reviewing defendants'claims of improper prosecutorial comment upon their post-arrest silence. See Morgan v. Hall, 569 F.2d 1161 (1st Cir. 1978); United States v. Nunez-Rios, 622 F.2d 1093, 1101 (2nd Cir. 1980); United States v. Agee, 597 F.2d 350, 359 (3rd Cir. 1979), cert. denied, 442 U.S. 944 (1979); Williams v. Zahradnick, 632 F.2d 353, 360-365 (4th Cir. 1980); United

States v. Dixon, 593 F.2d 626, 629 (5th Cir. 1979), cert. denied, 444 U.S. 861 (1980); Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977); United States v. Rowe, 591 F.2d 391, 399 (7th Cir. 1979); Jones v. Wyrick, 542 F.2.d 1013 (8th Cir. 1976), cert. denied, 430 U.S. 956 (1977); United States v. Wycoff, 545 F.2d 679 (9th Cir. 1976), cert. denied, 429 U.S. 1105 (1977); United States v. Birdwell, 583 F.2d 1135, 1139 (10th Cir. 1978); Sullivan v. Alabama, 666 F.2d 478, 485 (11th Cir. 1982); United States v. Williams, 556 F.2d 65, 67 (D.C. Cir. 1977), cert. denied, 431 U.S. 972 (1977). Thus, there appears to be unanimity among the federal courts on the applicability of the harmless error standard to the question at hand.

Recent federal cases have recognized that the question of harmless error in a Doyle v. Ohio context must be judged on a case by case basis. "The decision requires an examination of the facts, the trial context of the error, and the prejudice created thereby juxtaposed against the strength of the evidence of the defendant's guilt." Sullivan v. Alabama, supra, at 485, citing United States v. Menses-Davila, 580 F.2d 888, 890 (5th Cir. 1978). Accord, Williams v. Zahradnick, supra.

In United States v. Dixon, supra, the Fifth Circuit Court of Appeals examined several specific factors in making its decision as to whether or not a comment on the defendant's silence in that case contituted harmless error. The court first examined whether or not the prosecutor's question and the witness's answer would have been likely to cause any prejudice to the defendant in the minds of the jury. Second, the court examined whether or not it was likely that the trial court's instructions cured any slight prejudice which may have resulted. Third, the court examined whether the prosecutor attempted to capitalize on the tainted testimony during the remainder of the trial. Fourth, the court examined whether the defendant may have opened the door to comment by giving the impression that he had fully cooperated with the police

authorities. Fifth, the court examined the comment in light of the strength of the case against the defendant. Id., at 629-730.

In the instant case, the trial court issued a pretrial order directing the State not to introduce evidence of any statement by the Petitioner "to the effect that 'I won't say anything until I talk to my lawyer.'" (R. 23). As Petitioner points out in his brief, during the questioning of Detective John Seay, the chief investigating officer in the case, the district attorney ellicited some testimony from the chief investigating officer pertaining to Petitioner's actions and statements which he made following his arrest, after Petitioner was found lying in the wooded area behind his residence. He was conscious at the time. (T. 824). It is relevant to note that the stage was set for the district attorney's line of questioning by defense counsel's opening argument. In order to explain why Petitioner Hill was found lying in a wooded area with a pistol, defense counsel told the jury how the Petitioner was wounded in the shootout, and further stated:

> He either goes into shock or staggers or he is confused. He doesn't know what to do . . . He's confused. He doesn't make the best choices in the world . . . He doesn't know where the shots are coming from . . . He is confused. He is wounded. He is bleeding profusely. He goes up past the trailer in back of his house and on into the woods. Twenty yards or twenty feet or so he collapses. (T. 459, 460).

Thus, it was clear from the outset of the trial that the defense intended to explain the Petitioner's flight from the crime scene by asserting that he was confused due to the severity of his wounds. The intent of the district attorney's questioning was to illustrate that in fact the Petitioner was

neither confused nor seriously hurt, and that he did not accidentally stumble into the woods, but he was found there as a result of his purposeful intent to flee the crime, the scene and hide in the wooded area. The questioning of Detective Seay was intended to show that the Petitioner was fully conscious and aware of what was occurring around him. The following are two of the areas of questioning objected to by the Petitioner:

Q. Now, when you and the other officers located Floyd Hill lying in the woods, you said that he was conscious. Did you have an opportunity to talk with Mr. Hill at that time?

A. Yes, I did.

Q. Would you please tell us what you said, if anything, first, and what was said?

A. I asked him his condition first off, his physical condition.

* * *

Q. What did he say?

A. He said that he was shot.

Q. Did you give Mr. Hill any Miranda warnings at that time?

A. Yes. I first looked to see how badly he was wounded, and it didn't occur to be critical, so I began . . . first off, we called for an ambulance to transport Mr. Hill to the hospital, and then as we were waiting for this ambulance to arrive, I advised Mr. Hill of his rights orally.

* * *

Q. Now, basically what type of conversation did you have with him at that point?

A. Well, naturally I asked him, "what had happened?"

Q. What was his response?

A. His response was nil. He did not give a response.

* * *

Q. Sergeant Seay, did you have a conversation with Mr. Hill while you were waiting for the ambulance, not concerning any crime scene or investigation that you were conducting?

A. Yes, sir. I asked him if he was in great pain, and he said yes, his arm hurt, and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked me for a cigarette, which I found him a cigarette and gave it to him, and at that time he stated that he wanted his lawyer. (T. 827-832).

As the Georgia Supreme Court recognized, the district attorney was justified in believing that the defense really had no objection to the solicitation of the first statement by Sergeant Seay that Petitioner did not give a response when he was initially asked, "What had happened?" In the pretrial motion hearings, defense counsel indicated he had no objection to the State asking whether the Petitioner had given a statement or to a witness testifying that he had not. Hill v. State, supra, 259 Ga. at 283. It is also clear that the second reference to Petitioner's request for an attorney was an

unsolicited comment from witness Seay after the district attorney had specifically asked about Petitioner's statements "not concerning any crime scene investigation that you [detective Seay] were conducting."

The third alleged reference to Petitioner's silence occurred during the cross examination of the Petitioner. After Petitioner had testified that he was carrying a .32 caliber revolver for his own protection the district attorney asked him, "Did you ever try to explain all of this to anybody before today?" The trial court immediately sustained defense counsel's objection and instructed the jury that the Petitioner was under no duty to explain, and that the jury should disregard the last question. (T. 1084).

Here, as the aforesaid statement of facts amply shows, there was overwhelming evidence of the Petitioner's guilt, and the challenged statements did not have an intolerable prejudicial impact on his case. In the instant case, as was the case in United States v. Smith, 635 F.2d 411 (5th Cir. 1981), the prosecutor did not focus or highlight the references to the Petitioner's silence, and the comments by the witness were not elicited by the prosecutor in a deliberate attempt to bring the defendant's silence to the attention of the jurors.

In Stone v. Estelle, 456 F.2d 1242 (5th Cir. 1977), cert. denied, 434 U.S. 1019 (1978), the court found strong evidence which weighed against the Petitioner's argument that he had suffered prejudicial harm. Referring to Doyle v. Ohio, supra, the Stone decision noted that Doyle was directed to the prosecutorial use of a defendant's prior silence to attack the defendant's exculpatory statement at trial, went to the heart of his defense, and the prosecution's reference to his prior silence was an attempt to impeach and destroy that exculpatory story. However, in Stone the attacked comment was unrelated to the defendant's innocence or his exculpatory testimony. Additionally, the Court found overwhelming evidence of guilt, and thus concluded that the remarks did not unduly prejudice

the defendant. Stone, supra, at 1245-1246. In United States v. Davis, 546 F.2d 583, 594 (5th Cir. 1977), cert. denied, 431 U.S. 906 (1977), the court spoke of "an apparent requirement that to reverse a conviction the prosecutor's comment [must] strike at the jugular of the defendant's story." Here, Petitioner simply testified at trial that after attempting to assist officers Thames and Mullinax, he was shot in the back as gunfire occurred at the scene. The challenged testimony from officer Seay was not solicited by the prosecutor in order to infer guilt, but was merely an attempt to show Petitioner was conscious and aware of what was happening around him, and that he was not in a dazed state.

Moreover, as noted previously, the prosecutor in this case did not attempt to capitalize on any testimony relating to Petitioner's failure to comment on the shooting incident. Hill v. State, supra, 250 Ga. at 284, citing United States v. Dixon, supra.

In view of the voluminous and overwhelming amount of evidence against the Petitioner, in view of the trial court's instructions to the jury, and in view of the minimum prejudicial impact that any of the challenged comments or statements may have had against Petitioner's case, if any error was committed by reference to Petitioner's remaining silent at the time of his arrest, said error was harmless beyond all reasonable doubt and could not have contributed to the jury's verdict.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully urges this Court to deny the petition for a writ of certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent, certify that I am a member of the Bar of the Supreme Court of the United States, and that in accordance with the Rules of the Supreme Court of the United States, I have this day served Counsel for the Petitioner with a true and correct copy of this brief for the Respondent in Opposition, by depositing a copy of same in the United States Mail, with adequate postage attached thereto, and properly addressed to:

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This 2nd day of March, 1983

NICHOLAS G. DUMICH